Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 12, 1995

Mr. Jeffrey J. Horner
Bracewell & Patterson, L.L.P.
South Tower Pennzoil Place
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

OR95-274

Dear Mr. Horner:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30205.

The Conroe Independent School District (the "school district") received a request for records concerning a particular school district employee. You contend that the requested records are excepted from required public disclosure under sections 552.101, 552.102, 552.111, and 552.114 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." In order for information to be protected from public disclosure under the common-law right of privacy as incorporated by section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that:

> information ... is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing former section 3(a)(1) of article 6252-17a, V.T.C.S.). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts:

> (a) . . . information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under this chapter.
>
> (b) . . . a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Section 552.102 protects personnel file information only if its release would cause an invasion of privacy under the test articulated for common-law privacy under section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.) (court ruled that test to be applied in decision under former § 3(a)(2), V.T.C.S. art. 6252-17a, was the same as that delineated in *Industrial Found.* for former § 3(a)(1), V.T.C.S. art. 6252-17a). Accordingly, we will consider the arguments for withholding information from required public disclosure under the common-law privacy aspects of section 552.101 and section 552.102 together.

We have reviewed the documents and have not found any information that could be considered highly intimate and embarrassing. Furthermore, the public has a legitimate interest in the job performance of a public employee. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 467 (1987) (public has legitimate interest in job qualifications of public employees); *see also* Open Records Decision No. 455 (1987) (job performance or ability is not protected by privacy).

You also contend that the requested information is excepted under the constitutional right to privacy. The constitutional right to privacy consists of two related interests: (1) the individual interest in independence in making certain kinds of important decisions, and (2) the individual interest in independence in avoiding disclosure of

personal matters. The first interest applies to the traditional "zones of privacy" described by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976). These "zones" include matters related to marriage, procreation, contraception, family relationships, and child rearing and education and are clearly inapplicable here.

The second interest, in nondisclosure or confidentiality, may be somewhat broader than the first. Unlike the test for common-law privacy, the test for constitutional privacy involves a *balancing* of the individual's privacy interests against the public's need to know information of public concern. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)). The records at issue do not concern the "most intimate aspects of human affairs." You may not withhold any of the records under the common-law doctrine of privacy or the constitutional right to privacy.

Section 552.111 excepts "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Section 552.111 excepts from public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993) at 5 (copy enclosed). The policymaking functions of an agency, however, do not encompass routine internal administrative and personnel matters. *Id.* Furthermore, section 552.111 does not except purely factual information from disclosure. *Id.* As the information in question concerns routine internal administrative and personnel matters, you may not withhold any of the information under section 552.111 of the Government Code.

Under section 552.114(a), information is excepted "if it is information in a student record at an educational institution funded wholly or partly by state revenue." Section 552.026 incorporates another source of law, specifically, the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), into the Open Records Act, providing that the act:

> does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026; see also Open Records Decision No. 431 (1985). FERPA provides the following:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C. § 1232g(b)(1). "Education records" are records which:

> (i) contain information directly related to a student; and
>
> (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). Sections 552.114(a) and 552.026 may not be used to withhold entire documents; the school district must delete information only to the extent "reasonable and necessary to avoid personally identifying a particular student" or "one or both parents of such a student." Open Records Decision No. 332 (1982) at 3. Thus, only information identifying or tending to identify students or their parents must be withheld from required public disclosure. Some of the documents contain information relating to students or their parents. We have marked the information that must be withheld under FERPA and section 552.114 of the Government Code.[1] The remaining information must be released in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Loretta DeHay

Loretta R. DeHay
Assistant Attorney General
Open Government Section

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[1]We do not address in this ruling what due process rights, if any, the requestor's client has in the information that you must withhold under FERPA.

LRD/LBC/rho

Ref: ID# 30205

Enclosures: Open Records Decision No. 615 (1993)
Marked documents

cc: Ms. Susan Pace
Texas State Teachers Association
3435 Branard, Suite 101
Houston, Texas 77037
(w/o enclosures)